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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 969.

SONKEN-GALAMBA CORPORATION, A CORPORATION, AND THE TANK CORPORATION, A CORPORATION, PETITIONERS,

VS.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, A CORPORATION; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, A CORPORATION; AND THE TEXAS AND PACIFIC RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Sonken-Galamba Corporation, a corporation, and The Tank Corporation, a corporation, respectfully show to this Honorable Court:

A.

SUMMARY OF MATTER INVOLVED.

(a) The tariffs of virtually all railroads, on file with the Interstate Commerce Commission, provide, as stated in the opinion, that rates on "scrap" shall apply on "pieces (separate or combined) of iron or steel having value for remelting purposes only," substantially the dictionary definition. Petitioners contend that the Eighth Circuit Court of Appeals following its own previous decision of *Crancer* v. *Lowden*, 121 F. 2d 645, certiorari granted October 13, 1941, No. 505, and now pending for argument in this court, has misconceived and approved an erroneous and illegal test of the "value" in question.

This tariff definition has given the Interstate Commerce Commission a great deal of trouble. The Commission has recognized that if it is so interpreted and applied as to make the rate really dependent on the use a given shipment is put to, it is unlawful, commenting on "the difficulty of framing any definition that is wholly free from elements of unlawfulness. *Weissbaum & Co.* v. *Dir. Gen.*, 53 I. C. C. 681." *Class. Ratings on Rags*, 98 I. C. C. 591; *Consol. Stone Cases*, 200 I. C. C. 65. To escape this, the Commission has ruled that the note is only valid as descriptive of the nature of scrap. The definition is so indefinite and sets up so doubtful a standard and is so susceptible of abuse and misunderstanding as to render any ground at all of sustaining same extremely tenuous and restricted. Petitioners present the only interpretation upon which the validity of the note can possibly be saved, if at all. But this theory was denied and rejected by the courts below.

Petitioners are scrap-dealers operating in the Southwest. In that part of the country, principally Texas and Oklahoma, known as the Mid-Continent oil fields, in the early development of the oil industry large tank farms were formerly used for oil storage. Due to proration, obsolescence, pipe lines, and advanced theories of underground

storage these farms have been abandoned. Numerous old, rusted, huge, steel tanks weighing about 250 tons each stand empty in the fields. When sold they bring from $200 to $1,500, although originally costing $15,000 to $30,000 (R. 3095, 673, 2310, 2328, 3106) (1627, 141, 148, 206, 676, 788).

For many years the only market for such abandoned oil storage tanks has been the scrap-dealers, who in turn wreck them. They sell and ship the pieces to the mills, who remelt them with pig-iron in their furnaces. Particularly has this been true throughout the states lying East of the Mississippi (R. 673-6, 2309-19, 2321-28, 868, 871).

The Eastern railroads connecting with the bulk of the country's mills, members of the Trunk Line Freight Inspection Bureau, an association of the Eastern railroads, functioning as their classification and rating agency have specifically classified the very commodity as scrap, moving at scrap rates (R. 370-376). See quotations from letters, pages 5-6, *post.*

95% of the nation's steel mills are concentrated East of the Mississippi and they normally draw their scrap supplies from nearby territory, since the freight and the delivered price are thus minimized. Distant scrap dealers in the Southwest cannot ordinarily compete with Eastern scrap dealers for mill business. Therefore in the Southwest comparatively little scrap moves to the Eastern mills except when scrap prices are high, all of which the Interstate Commerce Commission has repeatedly pointed out. Consequently these abandoned oil tanks have stood in the Southwest for years rusting in the fields, during the very period that throughout the East there flourished an extensive, consistent, established business therein conducted by the scrap dealers (164 I. C. C. 587; R. 3528, 3507-8, 3384, 778, 865, 1490).

In the latter part of 1936 exports of scrap steel from the East increased and prices went up. Petitioners appreciated that the Southwest with its Gulf ports could

share in this export trade. They began buying and wrecking these old tanks in the Southwest. They transported the pieces either by truck or in open cars without protection from damage or elements, in the prescribed manner for shipping scrap, and in consideration of which low rates are accorded to scrap (R. 1575, 1631, 864, 778, 1128; 226 I. C. C. 683; 164 I. C. C. 487).

Such of the commodity as the Eastern mills would absorb was sold and shipped to them. Part of the surplus was for a short time exported, but this was discontinued by governmental regulation several years ago. To dispose of quantities that remained on hand petitioners resourcefully interested several local tank builders in the vicinity of the wrecking operations in experimenting in reconditioning the lighter pieces and constructing small tanks therefrom. This business, too, proved purely temporary and ultimately unsuccessful. Petitioners, through individual sales efforts, disposed of additional limited quantities for numerous, different miscellaneous uses to parties scattered over nearby territory. Lastly, it appeared that oil companies in this territory from time to time had tanks carefully dismantled and reerected nearby. Only a few dealers other than petitioners entered the field to engage in like activities (R. 2736, 2387, 2585, 2330, 2662).

Up to 1936 all railroads, Western and Eastern alike, transported this old tank material as scrap at scrap rates, recognizing no consistent value therefor except as elementary metal. However when the Southwest export movements to Houston began, the Western Weighing and Inspection Bureau, a private association of over 100 Western railroads, corresponding to the aforementioned Trunk Line Freight Inspection Bureau in the East, suddenly notified all members that this commodity was not scrap and the higher "plate" rate should be applied. Thereupon respondents and other Southwestern railroads refused to transport the commodity at scrap rates, although a few Southwest carriers continued to do so. The Bureau based

its stand on the aforementioned exports and local uses, asserting that by reason thereof the commodity had value for other than remelting purposes (R. 321 to 325).

The Bureau also endeavored to persuade Trunk Line Freight Inspection Bureau and Official Classification Committee, serving Eastern carriers, to classify as "plates" and not scrap, a number of carloads of the identical kind of material involved here. These Eastern Committees refused to do so. The Trunk Line Bureau wrote (R. 370, 1):

> "Our inspection disclosed that the material in all the shipments referred to was purchased as Scrap Iron and consisted of old used Steel Tank Plates of various sizes and upon arrival at their plant were unloaded in their stock house with other scrap where it was cut into small pieces and is to be remelted in their open hearth furnaces. These shipments were invoiced as Scrap Angles and Tank Plates, and were described for shipment either as Scrap Iron or Scrap Iron consisting of Old Tank Plates. The material was loaded loose at random and was not braced or protected in any manner and some of the plates, particularly those which were in the shape of a triangle, were badly bent.
>
> For your information, would advise that the Weirton Steel Company are large manufacturers of various Iron and Steel articles and they receive numerous shipments of Scrap Iron daily which is used by them in the manufacture of their products.
>
> In view of the foregoing, you will observe that this material is nothing more than scrap iron or steel and shipments were correctly charged at the Scrap Iron rate as originally billed."

The Official Classification Committee wrote (R. 380, 1):

> "This committee has, for many years, held and is still holding that iron articles of this character, which are offered for shipment as scrap iron having value for remelting purposes only and on which charges have been assessed at the rating for the specific article, that if it is proven to the satisfac-

tion of the terminal line that the shipments had value only for remelting purposes and are actually remelted, the scrap iron ratings would apply thereto. In this particular case, Mr. Krill's investigation has developed that these old used steel tank plates were described for shipment either as 'scrap iron,' or 'scrap iron consisting of old tank plates' and were at destination cut into small pieces to be remelted in open hearth furnaces. Under the circumstances, we feel that these two shipments from Ranger to Weirton should be charged for at the scrap iron rates."

(b) Petitioner, Sonken-Galamba Corporation, contending that the character of the commodity was to be determined as a class by the vast stream of commerce therein as a whole, and not by local uses in a single part of the country or by exports to foreign countries, mandamused the respondent, Texas and Pacific Railway Company, in the United States District Court of Texas. Judgment, pursuant to a jury verdict that the material there involved was scrap, was affirmed by the Fifth Circuit Court of Appeals and this court denied certiorari. *T. & P. Ry. Co.* v. *Sonken-Galamba Corp.*, 100 F. 2d 158, 306 U. S. 655.

The Bureau, refusing to recede from its stand, said petitioner then successfully mandamused all of the remaining respondents in the District Court of Missouri, the commodity there involved being adjudged scrap. Furthermore, in this latter proceeding the Western Weighing and Inspection Bureau, which the court found was "acting for and on account of the railroads respondents herein and other railroads" was joined and was ordered to "forthwith and henceforth discontinue, cease and desist from classifying the material hereinbefore referred to and material of the same class and similar thereto that may hereafter be tendered for shipment by relator as being anything other than iron or steel scrap having value for remelting purposes only, carrying a tariff rate accordingly." This judgment was affirmed by the Eighth Circuit Court

of Appeals. *A., T. & S. F. Ry. Co.* v. *Sonken-Galamba Corp.*, 98 F. 2d 457.

Still another carrier was similarly mandamused in the United States District Court of Missouri. *Sonken-Galamba Corp.* v. *K. C. So. Ry. Co.* (R. 660-662). And yet another railroad filed suit in the United States District Court of Texas for alleged undercharges and a jury found the material to be scrap. *T. & N. O. Rd. Co.* v. *Sonken-Galamba Corp.* (R. 11-23).

Thus each of the respondents was a party to a suit brought by one of the petitioners in which the particular material involved was adjudged to be scrap, and all were members of the Bureau against which judgment was rendered so classifying all similar material.

(c) While all this was going on the price of scrap dropped sharply. Petitioners, who were affiliated, thereupon filed suit in the United States District Court, Missouri, against the respondents under Section 8 of the Interstate Commerce Act for alleged damages, including loss of business and profits, sustained by reason of respondents' wrongful refusal to transport as scrap not only the particular material involved in the mandamus suits but also other like material (R. 1).

The carriers based their defense on the export and other local uses aforementioned, taking numerous depositions to establish same, though they were never denied. They summarized these facts in affidavit form and then unsuccessfully petitioned the United States Circuit Court of Appeals for the Eighth Circuit for leave to reopen and set aside the mandamus proceeding. *A., T. & S. F. Ry. Co. et al.* v. *Sonken-Galamba Corp.*, 106 F. 2d 899.

Thereupon the damage suit went to trial. The trial court reversed his own views previously expressed in one of the mandamus cases aforementioned. He rejected petitioners' contention that local, temporary, partial uses of the commodity in a single part of the country did not give color to the traffic in such commodity as a whole or fix

the identity of the class thereof. He refused to hold that the true test of the value in question was its uniform, general value by which the commodity was nationally recognized as a class. He also rejected petitioners' contention that the mandamus judgments were conclusive that all material in the same class was scrap (R. 193 to 204).

(d) While an appeal was pending respondents filed a petition with the Interstate Commerce Commission calling attention to the mandamus cases and the damage suit, asking an investigation concerning rates, rules, regulations and practices governing interstate transportation from and between points "*in western territory* of steel plates from dismantled oil tanks." This petition was denied.

(e) The Circuit Court of Appeals for the Eighth Circuit on appeal affirmed the District Court holding:

> "The commodity in mass is not susceptible of a positive classification because each tendered shipment must be subjected to the test as to whether it has a value for other than remelting purposes."

The court also held that the mandamus judgments were conclusive only as to the particular shipments or material therein passed on, and was not conclusive as to the entire class of such commodity. It also held that petitioners were not entitled to damages because their claim was bottomed on injury to their business as a whole including material not involved as well as that involved in the mandamus cases, and under the court's view that such unadjudicated material was not scrap there could be no recovery (R. 193-204).

B.

STATEMENT OF THE BASIS FOR JURISDICTION.

(a) The writ of certiorari is applied for under Rule 38 and Section 240(a) of the Judicial Code as amended

by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347(a)), and is the proper remedy.

(b) The date of the judgment of the United States Circuit Court of Appeals for the Eighth Circuit is January 8, 1942 (R. 3887, Opinion same date, R. 3873).

(c) The nature of the case and the rulings below are such as to bring the case within the jurisdictional provisions relied on, for the reasons set out herein, for the allowance of the writ.

C.

QUESTIONS PRESENTED.

This petition tenders two important questions that should be settled by this court:

1. Under a freight rate tariff filed pursuant to requirements of the Interstate Commerce Act, "scrap" rates are stated to apply on "pieces * * * of steel * * * having value for remelting purposes only." Does this have reference to the particular value attaching to each specific shipment measured alone, or does it refer to the value generally attached to the commodity as a class, having regard to the national commerce therein as a whole?

Is the true standard the recognized commercial value which identifies the commodity as a class generally and uniformly throughout the nation, or is each separate shipment scrap according to whether that particular shipment has a market for remelting purposes only or for some other use?

Petitioners contend that to attain the uniformity required by the nationally operative Interstate Commerce Act, the true test is the same as that declared by this court under other general enactments, for example, the federal duties tariffs, viz., value which is definite, uniform and general as distinguished from local, personal or partial values. In short, is the view taken by the Eastern railroads and their aforenamed rating bureau correct or are the Western carriers and their rating bureau right?

2. Under the Interstate Commerce Act prohibiting discriminations, various remedies, including mandamus, are provided whereby to settle classification disputes. After a final judgment against a railroad adjudging the classification of specific material, is not that question conclusively settled as to all similar shipments of material of the same class, by any and all subsequent shippers, at least so far as that carrier is concerned?

D.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(a) The Circuit Court of Appeals, as will appear from the argument, *post*, has decided in a way probably untenable important questions of federal law which should be settled by this court.

(1) Inasmuch as this court granted certiorari in *Crancer* v. *Lowden*, 121 F. 2d 645, October 13, 1941, No. 505, the very case decided by and followed by the court below, it seems desirable that certiorari be granted in the instant case also.

(2) A confused and intolerable situation exists among scrap-dealers, mills and railroads that requires clarification. The Interstate Commerce Commission has ruled that there is "little, if any, material which in a strict sense can be said to be of such a character as to have value for remelting purposes only" (136 I. C. C. 703), yet the Court below has declared the definition is to be literally applied in a strict and narrow sense. If adhered to, this leaves the tariffs with no workable classification for commercial scrap and demoralizes the industry. East of the Mississippi the enormous steel tonnage derived from wrecked oil tanks is in the present state of the evidence regarded as scrap for transportation purposes, but West of the Mississippi it has now been ruled that identical material is not scrap. Again, if the test subscribed to by the Court of Appeals is adhered

to one carload of the commodity may be considered not to be scrap because sold for some useful purpose, while an identical car alongside for which no market but the mills could be found would be considered scrap. Judicially to sanction such a discriminatory practice will destroy the uniformity commanded by the Interstate Commerce Act. In effect it sets up as a criterion of identity the use to which each given shipment is put, a rate-making test which this court has held to be illegal.

(3) It has generally been supposed that decisions dealing with rates prescribed under the authority of the Interstate Commerce Act inure to the benefit of the general public. Otherwise discrimination in favor of formal parties to the proceedings will be fostered. It seems important to settle whether court and commission decisions classifying commodities for rate purposes should not similarly be conclusive against the carriers involved, at the instance of any shipper and in respect of any shipment of a commodity falling in the same class.

(4) The present importance of the subject-matter, scrap steel, invites a decision that will dispel all doubt as to whether the vast potential supply thereof, needed urgently at the present time by the mills, may be made available from these old steel oil tanks, which must rust in the fields if not transportable as scrap at scrap-rates.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 11998, *Sonken-Galamba-Corporation, a Corporation, and The Tank Corporation, a Corporation, Appellants,* v. *The Atchison, Topeka & Santa Fe Railway*

Company, a Corporation; Missouri-Kansas-Texas Railroad Company, a Corporation; Missouri-Kansas-Texas Railroad Company of Texas, a Corporation; and The Texas and Pacific Railway Company, a Corporation, Appellees, and that the said opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and proper; and your petitioners will ever pray.

Sonken-Galamba Corporation and
The Tank Corporation,

Petitioners,

By WILLIAM G. BOATRIGHT,
HARRY L. JACOBS,
BERNARD L. GLOVER,
Kansas City, Missouri,

Counsel for Petitioners.



Supreme Court of the United States

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VS.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the District Court was rendered July 3, 1940, and is reported as *Sonken-Galamba Corporation et al. v. A., T. & S. F. Ry. Co. et al.*, 33 F. Supp. 814,

pages 193 to 204, of the printed record. The opinion of the Eighth Circuit Court of Appeals was rendered January 8, 1942. It is not yet reported and is shown in full at page 3873 of the printed record.

II.

JURISDICTION.

A complete statement of the basis of the jurisdiction of this court has been given under heading B in the Petition, *supra*. In the interest of brevity it is not repeated here.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading A in the Petition, *supra*. In the interest of brevity it is not repeated here.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that each shipment of the commodity involved was to be tested by whether it had a value for other than remelting purposes at the time and place where tendered without regard to the national demand, and in refusing to hold that the value in question was value of the commodity as a class, that is, the definite, uniform and general value rather than local, partial and personal values.

2. In holding that the mandamus judgments in favor of one of petitioners against each of respondents and against Western Weighing and Inspection Bureau, of which respondents were members, was not conclusive, as to all shipments of material falling in the same class, and

assertable by all shippers, whether parties to prior proceedings or not.

3. In holding that damages were not recoverable because the petitioners' claim was bottomed on injury to a business including commodity not involved in the mandamus cases and in holding respondents justified in declining to transport such other material as scrap, and in holding there was no loss of market and no compensable loss of financial backing.

V.

SUMMARY OF ARGUMENT.

POINT A.

Usage Determining a Commodity's Commercial Identity Must Be Uniform and General.

1. In classifying an article under a general enactment its commercial designation is determined by its established usage. Such usage and value must be definite, uniform and general and not merely partial, local or personal. The commodity must be identified as a class and not by parts of the class.

Maddock v. *Magone*, 152 U. S. 368.
Berbecker v. *Robertson*, 152 U. S. 373.

(1) Determining identity by value of each individual shipment of a commodity at time and place of tender is discriminatory and illegal, since identical shipments might be accorded different rates according to the use each was put to.

Wrought Washer Mfg. Co. v. *Pere Marquette Ry. Co.*, 136 I. C. C. 703.
I. C. C. v. *B. & O. R. Co.*, 225 U. S. 326.
I. C. C. v. *D., L. & W. R. Co.*, 220 U. S. 235.
Union Smelt. & Ref. Co. v. *Penn. R. Co.*, 152 I. C. C. 434.

(2) Tariff definition of scrap—"having value for remelting purposes only" defines the nature of the commodity as a whole and as a class and must not be applied so as to make the rate dependent on the use.

Pittsburgh Crushed Steel Co. v. *B. & M. R. Co.*, 140 I. C. C. 339.

Alaska Junk Co. v. *S. P. & S. R. Co.*, 98 I. C. C. 551.

Graver Corp. v. *So. Ry. Co.*, 156 I. C. C. 619.

(3) Each shipment should be considered and evaluated as a mere incident of a vast stream of commerce, the classification to be identified by the whole and not by its isolated parts.

(4) The proof showed this commodity as a class had national scale value for remelting purposes, and was traded in for non-melting uses in only one part of this country. Uses to which exported material was put have no bearing.

Tyng v. *Grinnell*, 92 U. S. 467.

R. Boker & Co. (Inc.) v. *U. S.*, 19 Ct. Cust. & Pat. App. 27.

(5) Commodity not "plates" because deteriorated and not of even gauge and thickness.

Prosser v. *U. S.*, 1 Ct. Cust. & Pat. App. 29.

Davis George Mfg. Co. v. *A. G. S. R. R. Co.*, 123 I. C. C. 10.

(6) Commodity was deteriorated to condition recognized by Commission as scrap stage, viz., undamageable in open car shipment.

Waste Mat. Dealers Ass'n v. *C., R. I. & P. Ry. Co.*, 164 I. C. C. 587.

Reduced Rates, 68 I. C. C. 676.

Consol. Southwestern Cases, 123 I. C. C. 203.

(7) Interstate Commerce Commission has ruled that under "strict sense" construction of tariff definition there is no steel material that has value for remelting purposes

only. Hence, common sense, practical interpretation is necessary.

Wrought Washer Mfg. Co. v. *Pere Marquette Ry. Co.*, 136 I. C. C. 703.

Pittsburgh Crushed Steel Co. v. *B. & M. R. Co.*, 140 I. C. C. 339.

(8) Importance of settling the classification of this this commodity.

POINT B.

Character of the Commodity Was Adjudicated by the Mandamus Judgments and Could Not Be Relitigated.

1. Proper classification of this commodity as scrap was litigated by each of respondents against one of petitioners. In the interest of uniformity, such finding should be held to inure to all shippers and to apply to all shipments of commodity of the same class.

Phillips v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662.

Mitchell Coal Co. v. *Penn. R. Co.*, 230 U. S. 247.

Babbitt Bros. Tr. Co. v. *A., T. & S. F. Ry.*, 156 I. C. C. 677.

Nat. Pole Co. v. *C. & N. W. Ry. Co.*, 211 Fed. 65 (C. C. A. 9).

A. L. Jones Co. v. *C., M. & St. Paul Ry. Co.*, 213 Ill. App. 283.

POINT C.

Damages Are Recoverable If the Commodity Is Scrap.

1. If it is ultimately determined that the commodity was scrap under the true test of value, then petitioners are entitled to damages resulting from respondents' wrongful refusal to transport same at scrap rates.

VI.

ARGUMENT.

POINT A.

(SPECIFICATION 1.)

Usage or Value to Determine the Commercial Identity of a Commodity Must Be Definite, Uniform and General and Not Merely Local, Partial or Personal.

(a)

The tariffs provide that rates on scrap apply to "pieces of * * * steel * * * having value for remelting purposes only." The controversy is as to the sense in which "value" is used. To avoid running afoul of statutory prohibitions against discrimination the definition must be construed so as to apply the rate uniformly to all physically identical shipments.

The court below, following its own previous opinion in *Crancer* v. *Lowden*, 121 F. 2d 645, now pending in this court on certiorari granted October 13, 1941, No. 505, declared the test was simply to consider each tendered shipment by itself and if IT had any value except for remelting IT was not scrap.

Petitioners contended unsuccessfully that such a method in the last analysis bases the rate of each particular shipment on the use for which it is sold, a criterion of rate-making repeatedly condemned by this court and by the Interstate Commerce Commission as illegal. So tested, one of two identical shipments might at the very same time and place be scrap and the other not, and in place of uniformity there would be discrimination and confusion.

Petitioners contended that the true test was that each shipment should be considered as a mere incident of a vast national scale stream of commerce in such commodity, and

the commercial designation and classification should be of the commodity as a class and identified by the whole, the parts taking on the color of the whole. And if upon a broad view of the whole it appeared that the commodity was consistently and generally regarded solely as elementary metal valuable only for remelting, then it was scrap, notwithstanding other localized uses of limited quantities or particular shipments in limited areas for other uses.

(b)

A concrete example illustrates the untenability of the sustained test. Suppose ten dealers each tender for shipment a carload of the identical commodity. Suppose one car was consigned to a purchaser for some of the miscellaneous uses adverted to in the opinion. Suppose the other nine cars were consigned to mills for remelting, no other sales thereof being possible. It cannot be that nine cars are scrap and the other is not. Suppose all ten happened to move out of the shipping point at the same time and as part of a single train. Certainly these identical cars must be deemed the same commodity. Or suppose five cars in the East move to the mills, salable only for remelting, and five cars in the Southwest move at the same time to a nearby consignee using same for non-remelting purposes. It cannot be that five cars are scrap and five are not. Or suppose today five cars are sold locally for non-remelting uses, and for the next month there is no market except the mills, then five cars are again sold for special uses. It cannot be that the commodity is not scrap today but is scrap the next month and then not scrap the next day.

The Interstate Commerce Commission has condemned such an application of the definition, saying:

> "Aside from this contention, however, complainant urges that it is the practice of defendants, in interpreting this definition and in determining

whether they will apply the scrap-iron rates on a particular shipment, to inquire into the character, business, and equipment of the consignee; so that if the consignee happens to be a steel mill equipped to remelt the material the scrap-iron rate is applied, but if the consignee has no remelting facilities and puts the material to some use which does not entail remelting the scrap-iron rate is not applied even though the material is identical in kind. The evidence introduced by complainant strongly supports its contention in this respect and is not controverted by defendants. Such a method of determining the rates to be applied is clearly indefensible. There can be but one applicable rate on like shipments of the same commodity between the same points."

Wrought Washer Mfg. Co. v. *Pere Marquette Ry. Co.*, 136 I. C. C. 703.

The Commission has repeatedly pointed out that neither use, price, demand, representations or incidents of billing determine whether a commodity is scrap, and the definition is not to be so construed.

"The words 'value for remelting purposes' define the nature of the article, and they do not make the rate to be applied dependent upon its use."

Alaska Junk Co. v. *Ry. Co.*, 98 I. C. C. 551.

Pittsburgh Crushed Steel Co. v. *R. Co.*, 140 I. C. C. 339.

Graver Corp. v. *Ry. Co.*, 156 I. C. C. 619.

It is illegal to determine rates according to the use to which a commodity is put.

I. C. C. v. *Rr. Co.*, 225 U. S. 326.

I. C. C. v. *Rr. Co.*, 220 U. S. 235.

Union Smelt. & Ref. Co. v. *Rr. Co.*, 152 I. C. C. 434.

"Nature" as used in the above quotation simply means "species."

(c)

This court has announced the principle controlling the ascertainment of the commercial identity of a commodity moving generally throughout the national flow of commerce.

> "Necessarily, the commercial designation is the result of *established usage* in commerce and trade; and such usage, to affect *a general enactment*, must be *definite, uniform*, and *general*, and *not partial, local* or *personal*.
>
> * * * * * * *
>
> But the difficulty is that if these articles were only so known in one trade or branch of trade, or *in one part of the country*—partially and locally, and not uniformly and generally—the conclusion announced by the instruction would not follow. Recovery could not be had on a theory, involving different rates of duty at different ports of entry. * * *" (Italics ours).
>
> *Maddock* v. *Magone*, 152 U. S. 368, 14 S. Ct. 588.
> *Berbecker* v. *Robertson*, 152 U. S. 373, 14 S. Ct. 590.

We do not see why the above test, laid down in cases arising under the customs tariffs governing imports, is not applicable here. To attain the uniformity aimed at by the Interstate Commerce Act, the value which earmarks a commodity must necessarily be the result of established usage in commerce so extensive and so consistent as to be definite, uniform and general. In this view, partial, local, temporary and personal uses must be laid out of consideration. Thus only may the definition of "scrap" be given a workable, valid operation.

(d)

Under the evidence, the commodity involved in the case at bar (rusted pieces of old, obsolete, abandoned, wrecked oil tanks) has been traded in extensively and for years all over the United States as scrap supplying the

mills. That is its sole use and value in the East so far as the evidence in this record is concerned. Respondents took over a hundred depositions in the United States and even in foreign countries, yet they carefully limited their inquiry so as not to reveal the value and use of this commodity East of the Mississippi. Thereupon, petitioners furnishing the only evidence as to the condition in the East, showed without contradiction that the only recognized commercial value of this commodity in the East was for remelting purposes. The aforementioned Eastern carriers and rating Bureaus regard the commodity as scrap. Before this controversy arose the Western carriers and rating Bureaus so regarded it. Indeed, even during the period in question large tonnages of the commodity were shipped and transported as scrap from the Southwest to the Eastern mills for remelting. Hence, it is undeniable that the one and only "definite, uniform and general" value of the commodity recognized everywhere in the country was for remelting.

Other uses to which the commodity was diverted in the Southwest may be dismissed for they were all confined to a limited part of the country and to but a handful of the 20,000 scrap dealers in this country. They were experimental, temporary, fortuitous and sporadic. They fall squarely within the language of this court in the Maddock case—"partial, local or personal." The uses of the exported commodity—to hand-forge small tools therefrom—are likewise of no consequence here, for the use made in a foreign country of a given commodity cannot be allowed to determine its identity in this country. *Tyng* v. *Grinnell,* 92 U. S. 467; *Boker & Co.* v. *U. S.,* 19 Ct. Cust. & Pat. App. 27.

Nor is there anything in respondents' contention that the commodity was "plates," as designated in the tariffs. The court of appeals did not pass on this or so hold. The distinguishing characteristic of the "plate" of commerce

is "uniformity of thickness and evenness of surface." *Prosser* v. *U. S.*, 1 Ct. Cust. & Pat. App. 29, 31. All of the material involved here consisted of fragments or pieces of tanks so rusted and deteriorated that no single piece was of uniform gauge or thickness, and all had reached what the Commission regards as the scrap stage from a transportation standpoint, viz., it loaded heavily in open cars and was not susceptible of further damage. *Waste Material Dealers Ass'n* v. *C., R. I. & P. Ry. Co.*, 164 I. C. C. 587; *Reduced Rates*, 68 I. C. C. 676; *Consolidated S. W. Cases*, 123 I. C. C. 203.

(It may not be amiss here to point out that the popular conception of scrap as a tangled mass of miscellaneous pieces of iron and steel is erroneous. The mills all have more or less uniform requirements set out in printed specifications. Scrap is classified into approximately seventy-five kinds, and plate scrap is one of the prime classes, for scrap must fit compactly in the charging boxes of the furnaces of the mills.)

(e)

Tariffs are for the guidance of business men and must be plain and unambiguous. A shipper is entitled to know the rate of his commodity without question before he ships. Tariffs on scrap are addressed to dealers in scrap. Scrap dealers throughout the country may be expected to know of the "definite, uniform and general" value and usage of their commodity. They are not expected to acquaint themselves with local, partial or personal uses. The recognized commercial value (for remelting), which identifies scrap as a class, is so general and so thoroughly established as to enable a scrap dealer to recognize scrap by its nature and by inspection, just as a farmer or a grain dealer can recognize wheat. Nothing less definite, general or established, in the way of usage or value, can be allowed to transform scrap into something else.

Of course, as the court below pointed out, the iden-

tification of each shipment of a commodity depends on examination of each shipment "for itself." This simply means that the character of wheat being known, recognizable and established upon broad, universally applicable considerations, the specific examination of the particular car is only to compare that car with the known class to determine if it is the same, of the same *nature,* and falls therein. Similarly the character of scrap is identified by a definition broadly identifying it as a class, but once the class is identified the note has served its true function. Thereafter, the particular inspection is only to compare the specific shipment with the known class as a whole, to ascertain if it is the same. And since the Commission has spoken and has reiterated in the note what comprises the class of scrap, such specific inspections, examinations, inquiries and comparisons are cognizable by any court or fact-finding body. To hold otherwise would amount to saying that the Commission has in words saved the validity of the note, when it says that it simply defines the *nature* (species) of the commodity and does not make the rate of a particular shipment dependent on the use it is put to, but having thus sustained the definition, it may be applied in its objectionable sense.

As a matter of fact a small percentage of all scrap is everywhere diverted to other uses. The evidence shows that the annual scrap traffic is upwards of 35,000,000 tons and approximately 3% or 500,000 to 1,000,000 tons annually are used for non-remelting purposes (R. 870). Under respondents' theory there literally is no such thing as scrap in this country.

The Commission, recognizing that under a literal application of the definition there is no such thing as scrap, has repudiated a "strict sense" construction of the tariff definition.

> "However appropriate it may have been originally, when much of the material now com-

mercially used for further manufacture without being remelted was perhaps regarded purely as waste and suitable only for remelting, it now appears that *there is little, if any, material which in a strict sense* can be said to be of such a character as to have value for remelting purposes only.

* * * * * * *

The situation disclosed clearly indicates the necessity of a revision of the present tariff provision with respect to scrap iron.

* * * * * * *

We have previously adverted to the unlawful manner in which apparently this definition is being applied by defendants and the necessity for a revision thereof in order to *more accurately describe the traffic intended to be covered.* The fact that such a revision may be attended with difficulty is no justification for denying to complainant reasonable rates" (Italics ours).

Wrought Washer Mfg. Co. v. *Pere Marquette Ry. Co.*, 136 I. C. C. 703.

Indeed, if the definition is such as to render nugatory the classification of scrap, for that nothing could qualify under it as a practical proposition, then the definition is void and must be disregarded. Otherwise it would be a trap and a snare for the unwary shipper.

It follows that the definition must be given the broad, common sense interpretation which petitioners contend for. In fact, ever since the Wrought Washer Mfg. Co. case the Commission itself has so applied the definition. To illustrate, in *Pittsburgh Crushed Steel Co.* v. *Rd. Co.*, 140 I. C. C. 399, where the shipper shipped carload after carload of steel screenings to a purchaser using same as an abrasive, it was held that this did not change the fact that the commodity was in its very nature scrap. For that matter, in the *Wrought Washer Mfg. Co. case*, 136 I. C. C. 703, the Commission reached the same result as to old boiler plates sold to a

washer manufacturing company and used by it to make washers from, holding it illegal to deny thereto the same rate as the billet or scrap rate.

(f)

There is a vast tonnage of this old tank steel that can be shipped to the mills if it is scrap. The identity of the commodity ought not to be allowed to remain in doubt, for scrap steel is of utmost importance in the nation's war preparations. If the test sanctioned by the court below stands, the numerous abandoned tanks must lie in the fields, for no shipper can afford to purchase, wreck and ship them except as scrap at scrap rates.

POINT B.

(SPECIFICATION 2.)

Character of the Commodity Was Adjudicated by the Mandamus Judgments and Could Not Be Relitigated.

Four times a commodity of the class in question was adjudicated to be scrap, twice by juries and twice by courts, with affirmance by two Circuit Courts of Appeals. One Circuit Court of Appeals thereafter denied leave to reopen the proceeding. Certiorari was denied by this court to the other Circuit Court of Appeals. But railroads are able to litigate forever, while, as this court has frequently pointed out, a single shipper cannot afford to stand up against them.

When it came to paying for their violations of the Act the carriers were permitted to relitigate the whole question a fifth time. This time they won.

That seems wrong to us. It offends the spirit of every rule against unfair protraction of litigation. Each respondent tried out the question in a case in which it was a party, and has had its day in court. All are members of the Western Weighing and Inspection Bureau bound by a judgment classifying the particular material

and all similar material. Why should they be allowed to relitigate the same question over and over again? If the courts erred there is a remedy, for the Commission has the power to reclassify.

In such circumstances the only possible question remaining was whether or not the material involved in the mandamus suits and that involved in the damage suit was substantially the same. However, there was no serious contention at the trial that there was any substantial difference. Respondents took the position that the material was *all* plates. Petitioners contended it was *all* scrap. The Western Weighing and Inspection Bureau in its initial circular letter of February 2, 1937, took the position that all of these shipments of "steel plates taken from dismantled oil tanks" were a "class of material" that was not scrap (R. 321 to 325).

Petitioners in every manner and in every court manifested that they considered the tonnage of material involved in the mandamus cases to stand on the same footing as the other tonnage involved in the suit for damages. Whatever distinctions they attempted as to the one they asserted as to the other. All uses made of material not involved in the mandamus suits were made of material involved in same. Indeed, respondents relied on their very evidence adduced in depositions taken in this case to support their contention that even the precise material adjudicated in the mandamus cases was not scrap, for when they applied to the Eighth Circuit Court of Appeals to reopen the mandamus case they supported their petition with a summary of the evidence in the instant case. Moreover, in the damage suit they re-introduced the records containing all of the evidence that had been adduced in the mandamus cases, as well as additional evidence as to the precise material involved in the mandamus cases.

In any event the trial court took the view that the issues in the mandamus cases and in the damage suit were

identical, although anomalously holding that the issues were not to be so regarded for the purpose of applying the doctrine of estoppel by judgment. The trial court said:

> "It should be easily conceivable that the weight of the evidence offered at a trial of such duration, involving such volume of testimony and exhibits, might well be on a different side of an identical issue than it was at trials requiring only a few days. *Exactly that has happened*" (Italics ours).
>
> *Sonken-Galamba Corp.* v. *A., T. & S. F. Ry Co.*, 33 F. Supp. 814 (R. 195).

It is our view that under a federal statute regulating carriers and shippers and requiring uniformity of treatment, whenever a carrier has once litigated the classification of a particular commodity, the decision is forever binding against that carrier, whenever a question as to classification of material belonging to the same class arises. Otherwise a particular shipper who obtained judgment could ship at the ordered rate while other shippers of a similar commodity could be denied that rate simply because they were not formal parties to the action. The carrier ought not be allowed to relitigate the question with each shipper or with the same shipper as to each separate shipment.

Perhaps what we contend for is not strictly the doctrine of *res adjudicata* or estoppel by judgment. Perhaps it is put on firmer footing as a necessary incident of the legislation regulating interstate commerce and the remedies and restrictions created thereby.

Phillips v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, forecasts such a conclusion. It holds that a proceeding before the Interstate Commerce Commission to determine the reasonableness of a rate is not purely private litigation, but is a matter of public concern in which the whole body of shippers is interested, and that the finding inures to the benefit of every person, for otherwise the

formal parties to the proceeding would secure an advantage over the general body of the public, working a preference in favor of the parties to the record which "would have destroyed the very uniformity which that body had been organized to secure."

The following cases apply the same principle:

Mitchell Coal Co. v. *Pa. R. Co.*, 230 U. S. 247.
Babbitt Bros. Tr. Co. v. *A., T. & S. F. Ry. Co.*, 156 I. C. C. 677.
Natl. Pole Co. v. *C. & N. W. Ry. Co.*, 211 Fed. 65 (C. C. A. 9).
A. L. Jones Co. v. *C., M. & St. P. Ry. Co.*, 213 Ill. App. 283.

The classification, whether by Commission or by Court, of a particular commodity is of interest to every shipper of a commodity belonging to the same class, and while the particular determination presents a factual question of which the Commission has no superior knowledge and is not an administrative question exclusively cognizant by the Commission, yet it is still of such a peculiar nature that the courts having once decided it, every shipper ought to be entitled to the benefit thereof.

POINT C.

(SPECIFICATION 3.)

Damages Are Recoverable If the Commodity Is Scrap.

The Court of Appeals held damages were not recoverable because injury, if any, to petitioners resulted from the rightful refusal to transport the commodity in question as scrap and for other reasons set out in the opinion. Of course, if ultimately it is determined the commodity was scrap, then the carriers' action was unlawful and damages must be assessed. We deem it unnecessary

to enlarge on this point unless the petition for certiorari is granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 969

SONKEN-GALAMBA CORPORATION, A CORPORATION, AND THE TANK CORPORATION, A CORPORATION,
(Plaintiffs and Appellants Below) Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, A CORPORATION; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, A CORPORATION; AND THE TEXAS AND PACIFIC RAILWAY COMPANY, A CORPORATION,
(Defendants and Appellees Below) Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Introductory Statement.

Petitioners herein seek to have this Court review a judgment of the Circuit Court of Appeals for the Eighth Circuit, dated January 8, 1942 (R. 3873), affirming a judgment of the United States District Court for the Western District of Missouri, Western Division, dated July 3, 1940 (R. 193-204), holding that defendants below (respondents here) had committed no unlawful acts toward plaintiffs

below (petitioners here), in violation of the Interstate Commerce Act, and that in no event had plaintiffs below, and petitioners here, suffered any damages.

Opinions Below.

Opinion of the District Court, denying motion of petitioners for summary judgment under Rule 56 of the Rules of Civil Procedure, was filed July 27, 1939, and is reported in 28 F. Supp. 456. Opinion of the District Court finding for respondents on the merits, after trial without a jury, was filed July 3, 1940, and is reported in 33 F. Supp. 814. Opinion of the District Court on motion of petitioners for new trial and for additional findings of fact was filed July 31, 1940, and is reported in 34 F. Supp. 15. Opinion of the Circuit Court of Appeals for the Eighth Circuit, affirming the judgment of the District Court, was filed January 8, 1942, and is reported in 124 F. (2d) 952.

Statement of Facts and Rulings of Courts Below.

The facts of this case and the essential findings of the courts below are not apparent from a reading of the petition herein. In petitioners' summary of matter involved there is set forth a wholly inaccurate and inadequate statement of the case, consisting principally of contentions of petitioners rejected by both lower courts.

At the outset it should be pointed out that this was not a case involving either the reasonableness or discriminatory character of any rate. No such allegation was made. The suit was one to recover damages; and the essential facts concerning the nature of such suit and the findings of the courts below are as follows:

The suit in the District Court was one under Sections 8 and 9 of the Interstate Commerce Act, wherein petitioners sought damages from respondents because of an alleged

refusal to transport, at the rates applicable to scrap iron and scrap steel, certain plates or sheets from dismantled oil tanks. While petitioners alleged that during the period when the damages are claimed to have accrued they owned certain material coming from dismantled oil tanks, their claim for damages related principally to alleged loss of profits on other materials from dismantled tanks which they alleged they would have bought, and in turn would have resold for export to the Orient at large profits, had respondents agreed in advance to transport all of said material at scrap-iron rates (R. 19, 22).

Scrap-iron rates apply only on pieces of iron or steel having value for remelting purposes only (R. 200).

The trial before the District Court, sitting without a jury, was long and arduous. As to this, the court said (R. 194, 33 F. Supp. p. 816):

> "With possibly one exception the trial was the longest in the history of this court. Thirty-three days were required for the trial proper and many days were devoted to preliminary matters. The transcript of testimony fills 4,568 pages. There were 683 exhibits. Depositions taken in many states, in Mexico and Canada, in China and Japan, were read in evidence."

Among other findings the District Court found (Finding V, R. 196-7, 33 F. Supp. p. 817):

> "Of the plates recovered from dismantled oil tanks, great quantities were remelted and were of value for remelting purposes only. Great quantities were used and were of value for purposes other than remelting: (a) for building oil tanks; (b) for constructing various kinds of storage receptacles; (c) for constructing feeding floors, building culverts, making runways, damming creeks; (d) for raw material (without remelting) for tools (chiefly an Oriental use). It is impossible from the evidence to determine what percentage of the whole mass of metal recovered and recoverable from oil tanks was or could be used and was of value for these other than remelting purposes."

The District Court further found (Finding VI, R. 197, 33 F. Supp. p. 817):

> "Plaintiffs consistently and continuously represented that the plates they had recovered from dismantled oil tanks were useful and of value for all purposes for which new plates could be used. They so advertised their plates in trade magazines, in periodicals and newspapers, in letters and orally."

Petitioners neither in the Circuit Court of Appeals nor in their petition here have ever challenged the facts set forth in the above findings of the District Court. They seek to avoid the effect of such uses of this material as determining value for purposes other than remelting under the tariff, but they do not deny such uses or the extent thereof found by the court. And they in no manner challenge the finding of the court that they consistently and continuously represented, by all manner and means, that their material had value for all purposes for which new steel plates could be used.

The court further found (Finding XII, R. 198-9, 33 F. Supp. p. 818), that there was not tendered by petitioners to any respondent company for transportation (except as certain mandamus suits hereinafter discussed may have constituted a tender as to certain specific quantities of tank plates) any carload of plates from dismantled oil tanks having value for remelting purposes only. Likewise, this finding of the court is not challenged by petitioners. It was their demand at all times that respondents handle at scrap-iron rates all tank plates owned by them, without regard to condition of the material or its value for the uses to which it would be put (R. 2271). On the other hand, it was at all times the position of respondents that they would handle at rates applicable to scrap iron any plates tendered to them which were in such condition as to have value for no purpose other than remelting (R. 537, 558-9, 560, 582, 3218-9, 3221). Respondents' refusal to accede to the demand of petitioners, that all such plates be handled without regard

to condition or value, was proper. As to this, the Circuit Court of Appeals said (R. 3886):

> "Except as to that material involved in the mandamus suits, the defendants, it now appears, were right in declining to accept and transport it at scrap rate."

Apart from any question as to the character of the material involved, the trial court found (Finding XIII, R. 199, 33 F. Supp. p. 818; R. 229-30, 34 F. Supp. 16) that petitioners suffered no damages, and this finding was approved by the Circuit Court of Appeals (R. 3884-86).

Both the District Court and the Circuit Court of Appeals recognized that certain specific quantities of tank plates, which were involved in the mandamus cases referred to in the petition, were determined by the judgments in those cases to be entitled to be carried at the scrap-iron rate, but both courts found that petitioners sustained no damages whatsoever as to those specific quantities. As to this specific material the Circuit Court of Appeals said (R. 3884):

> "Ordinarily, the measure of damage for the wrongful refusal of a carrier to accept and transport freight is the difference between the market value of the commodity at the time it should have been transported and such value when actually delivered. The court made a finding of no damages. The evidence warranted the court in finding that the market for plaintiffs' materials was rising from the latter part of 1936 until July, 1937, so that there was no basis for claim of loss of market. As to the 4,868 tons which plaintiffs claim was a part of the identical material involved in the mandamus suits, there was a considerable period of time following the issuance of the writs of mandamus during which the market value was as high or higher than it had been at any time prior to the issuance of the mandamus writs. Plaintiffs' testimony indicates that the 4,868 tons were made up of two consignments, one of 570 tons located at Wink and Wickett, Texas, involved in the Fort Worth mandamus suits, and one of 4,298 tons, located at Ramona, Oklahoma, involved

in the Kansas City mandamus suit. As to the 570 tons, it appeared that a representative of the carrier inspected the shipment at Wink, Texas, on March 16, for the purpose of determining its proper classification, but before he had made a report the plaintiff Sonken-Galamba Corporation, had already filed mandamus suit on March 17, 1937. Cars for loading were furnished as requested on March 24. The delay was negligible and there was no showing of loss of market. As to the 4,298 tons located at Ramona, Oklahoma, it appears affirmatively that this material was not purchased until April 23, 1937, almost a month after the termination of the period during which plaintiffs claim they suffered damages. It was not conceded by the defendants that this material was the identical material involved in the mandamus suit, and the trial court did not so find. Testimony with reference to the identity of this material is vague and indefinite, but if it be conceded that the proof might sustain a finding not made by the court that 4,868 tons of the material in controversy were on hand and involved in the mandamus suits, yet there is no substantial evidence that plaintiffs suffered any damages in connection with this material."

The above clearly refutes the statement on page 7 of the petition, that "While all this was going on the price of scrap dropped sharply."

On page 8 of their petition, petitioners state the Circuit Court of Appeals held they were not entitled to damages because their claim was bottomed on injury to their business as a whole including material not involved as well as that involved in the mandamus cases, and under the court's view that such unadjudicated material was not scrap there could be no recovery. Such statement of the Circuit Court's finding is incomplete and inadequate. That court also held, as to all materials, that petitioners were not damaged because there was a rising market from the

latter part of 1936 until July, 1937 (R. 3884), and further stated (R. 3886):

> "Whether or not plaintiffs would have realized profits from their business had there been no freight controversy with the defendants leads inevitably into the realm of conjecture and speculation."

The above-quoted language of the court below clearly and completely refutes the claim of petitioners that the Circuit Court held damages were not recoverable solely because of the rightful refusal to transport the commodity in question as scrap, and that if it should ultimately be determined that the commodity was scrap then damages must be assessed. The court clearly held petitioners suffered no damages whatsoever irrespective of whether the tank plates involved were scrap iron or not.

Questions Presented.

The record in this case does not justify the presentation of any question to this Court, in view of the fact findings by both the trial court and the Circuit Court, to the effect that, although petitioners' suit was one for damages, no damages were sustained. Petitioners do not even contend that such fact findings are subject to review by this Court and, therefore, seek to evade and circumvent such findings by presenting two questions which, even if determined in their favor, would furnish no reason for reversal of the judgment of the District Court or the Circuit Court of Appeals. Apart from this controlling feature of the case, the record discloses that petitioners' statement of the questions presented is neither accurate nor fair.

1. Petitioners state there is presented the question whether or not the test for application of scrap-iron rates to any commodity, "having value for remelting purposes only," applies to each specific shipment tendered to a

carrier, or does it refer to a given commodity as a class, having regard to the national commerce therein as a whole, and contend that the true test is that value which is definite, uniform and general as distinguished from local, personal or partial values; and inferentially represent that there is a different view as to these tests taken by the eastern and western railroads and the rate bureaus in the respective territories. No such differences between eastern or western railroads, or their respective bureaus, exist, as will be hereinafter specifically developed.

Truly, the question presented by petitioners is whether thousands of tons of first-class, second-hand tank plates, sold at prices far in excess of the current quoted scrap-iron prices for actual use in the reerection of other storage tanks, in the manufacture of smaller tanks, and in many other uses in lieu of new steel, may be transported at scrap-iron rates under tariffs stating those rates are applicable only on pieces of iron or steel having value for remelting purposes only. The accurate statement of petitioners' real contention indicates its absurdity. The answer is that any such construction of plain English words is without basis in sound reason or logic.

2. Petitioners further state the question is presented whether, under the Interstate Commerce Act, a final judgment against a railroad adjudging a classification of specific material, conclusively settles the classification of all similar shipments of material of the same class by any and all subsequent shippers, at least as far as that carrier is concerned. To so hold would vest the courts with legislative, not judicial, power. As to Federal legislation, only the Congress of the United States, or the Interstate Commerce Commission to a limited delegated extent, may exercise that function.

ARGUMENT.

The Courts' Findings That Immense Quantities, Perhaps the Greater Part, of Plates Recovered From Dismantled Oil Tanks Were Used and Were of Value for Purposes Other Than Remelting, Were Required by the Evidence Introduced, and Clearly Established the True Character of Said Material as Being Other Than Scrap Iron as Defined in the Applicable Tariffs.

As heretofore pointed out, the District Court found that a great part of these plates from dismantled oil tanks (R. 196), perhaps the greater part (R. 203), had value for other than remelting purposes, and such finding was approved by the Circuit Court of Appeals (R. 3881). Also as heretofore pointed out, petitioners do not challenge these essential findings of fact, but ignoring the plain, simple meaning of the ordinary English words used in the tariff, would contend that the broad use of this material for other than remelting purposes does not establish value for purposes other than remelting because such values were "local, personal or partial values" rather than values of the commodity as a class. The evidence of record clearly refutes such contention. Let us examine the facts.

By deposition prior to trial, and by the testimony of witnesses produced at the trial, respondents established, in the period 1936 to 1939, inclusive, the use of 148,000 tons of plates from dismantled oil tanks in lieu of new steel plate, in the vast territory from the Mississippi River to the Pacific Coast, in Illinois and Alabama east of the Mississippi River, and in the Orient. Of this tonnage, 83,427.69 tons were used in the reerection of large oil storage tanks, 34,235.88 tons were used in this construction of small

welded tanks, and 30,917.47 tons went into various other miscellaneous uses in lieu of new steel plate. Certainly there is nothing local, personal, or partial in the broad territorial and functional use of this material disclosed by the evidence. There is attached hereto, as an appendix, a statement referring to the witnesses and place in the record where such testimony may be found, and the method of arriving at the total tonnage referred to.

Dealing only with the tonnage of this material handled by petitioners, Exhibits 2066, 2067 and 2068, being an abstract of sales during the same period by petitioners Sonken-Galamba Corporation, The Tank Corporation, and Sonken-Galamba Supply Company, an affiliated corporation to which substantially all of the tank plate formerly belonging to petitioners was transferred in October, 1937 (R. 986), show that these corporations, in such period, sold a total of 90,895 tons, of which material only 12,995 tons was sold to steel mills or brokers for steel mills, 22,041 tons sold to exporters, and 55,899 tons sold to other classes of purchasers. So that, therefore, of this vast tonnage handled by petitioners and their affiliate, only 14¼ per cent was sold to steel mills or brokers for steel mills. It is apparent, therefore, that the claim of petitioners that the definite, uniform or general value of this commodity was for remelting purposes, is completely without foundation and overwhelmingly refuted by the evidence.

The evidence clearly establishing that the principal and predominant use of these dismantled oil tanks was for various industrial and structural uses other than remelting, in the broad territory from the Mississippi River to the Pacific Ocean and in the Orient, petitioners, in the courts below and here now, attempt to run out to another territory as to which there is no specific evidence and claim that in the eastern part of the United States the principal use of this material is for remelting. Let us examine the background of this unfounded contention.

In their complaint in this proceeding (Par. 7, R. 4) petitioners alleged that in certain places in the United States, particularly in Texas, Oklahoma, Kansas, Louisiana, Wyoming and Arkansas, by reason of certain factors among which were depletion of oil fields and proration laws, many oil storage tanks had become available for purchase; and further, in Paragraph 13 of their complaint (R. 8), petitioners alleged that Sonken-Galamba Corporation, through its efforts and foresight, had accumulated substantially the only large and readily available quantity of this material, which it dubbed "scrap iron and steel," of this uniform character and analysis in the United States or in the world. Respondents' investigation and evidence thus lay within the territory where petitioners stated was the only large and readily available supply of this material in the world. There are further and additional answers to this contention of petitioners. It is obvious that within any reasonable time respondents could not have extended their investigation and production of testimony to the entire United States. Such investigation and production of testimony as respondents were able to accomplish was done over the vigorous objection of petitioners, as indicated on page 40 of their brief filed in the Circuit Court of Appeals, where, referring to respondents' taking of depositions to establish this testimony as to the use of materials, they state:

> "* * * appellants finally filed an application in the trial court to end this oppressive, utterly immaterial and meaningless stratagem."

It is with ill grace that petitioners represent to this Court (page 22 of their petition) that respondents carefully limited their inquiry so as not to reveal the value and use of this commodity east of the Mississippi. Respondents' inquiry was directed to the territory in which petitioners stated lay the principal supply of this material. And without foundation in fact is the statement,

on page 7 of their petition, that the facts developed by the testimony of respondents were never denied. They were vigorously denied until respondents proved otherwise. Prior to the production of this overwhelming testimony by respondents, one of petitioners' principal witnesses had testified that the amount of this material used for other than remelting purposes was one-half of one per cent (R. 1915). Particularly apt is the language of the District Court (R. 202, 33 F. Supp. p. 819):

> "Plaintiffs' counsel, now recognizing, as they are compelled to do by the record here, that immense quantities of secondhand plates from dismantled oil tanks actually were used and of value for other than remelting purposes, * * *"

Now that, over the vigorous objection of petitioners and contrary to their contentions, respondents have established the uses of vast quantities of this material for purposes other than remelting west of the Mississippi Piver and in the Orient, petitioners boldly assert that in the territory east of the Mississippi River the principal use of this material is for remelting. The record does not sustain any such contention. A single witness produced by petitioners testified that such material had been remelted in the East (R. 868), but cited specifically not a single indentifiable pound or a single plate which had been dismantled and remelted.

However, respondents do not take the position, and it is not the law, that these plates from dismantled oil tanks are either scrap iron or not, dependent upon any percentage of total use of all of such material in the country, either for remelting or for other commercial purposes. Respondents have shown that the predominant part of such material coming from tanks dismantled in western territory was broadly and widely commercially used for purposes other than remelting, and under the existing tariff such material was not scrap iron. As to

any kind of tank plate in the East the same rule would apply. If such material had reached such a stage that it no longer had any value for purposes other than remelting, it would be scrap iron. If it was in such condition that it had a further commercial value it would not be scrap iron and scrap-iron rates would not apply. Thus, the Commission held in *Wrought Washer Mfg. Co.* v. *P. M. Ry. Co.*, 136 I. C. C. 703, that scrap-iron rates did not apply to the old and imperfect boiler and floor plate there involved because it had value for other purposes than remelting. The territory covered by this complaint was Wisconsin, Illinois, Indiana, Ohio, Michigan, Kentucky, Pennsylvania, New York and West Virginia, principally Official territory east of the Mississippi River.

Obviously, whether any given shipment is scrap iron or not must be determined by the condition of that shipment. Any other test is totally impracticable. As was stated by the District Court (R. 203, 33 F. Supp. p. 820):

> "The tariff was intended to be applied in a practical fashion by laymen. It was not intended that before it was applied a nation wide study must be made, that it must be ascertained what amount of such material was available in the country, what the national demand for other than remelting purposes is and then that the national supply should be weighed against the national demand."

Also pertinent is the following language of the Circuit Court of Appeals, Fifth Circuit, in *Macon, D. & S. R. Co.* v. *General Reduction Co.*, 44 F. (2d) 499, 501:

> "In the case at bar the question was not whether fuller's earth ought to be hauled as clay, and at the same rate. That question had already been determined by the commission and answered in the negative, and a different and higher rate fixed for fuller's earth. The sole question is whether the material tendered is fuller's earth, a question on which the commission has no superior knowledge. It is also a ques-

> tion whose answer has no general importance, for it may arise as to each car tendered anywhere, and will depend on an examination of each shipment for itself."

Similarly, whether a shipment is scrap iron or not must depend on an examination of such shipment itself.

Totally misleading and inaccurate is the statement on page 4 of the petition, that such of this commodity as the eastern mills would absorb was sold and shipped to them. There is not the slightest record support for any contention that the eastern mills could not absorb all of this material if shipped to them. As heretofore pointed out, the evidence showed that of the material traded in by petitioners and their affiliate, only 12,000 tons out of a total of 90,000 tons were sold to steel mills or brokers for steel mills. The very obvious reason why petitioners did not sell more of this material to eastern mills, or to any other mills, for remelting, was because they could obtain very much higher prices from other persons who used it for purposes other than remelting. Speaking of this material, the Circuit Court of Appeals said (R. 3881):

> "The average price received was far in excess of the going market value of scrap iron."

This finding of the court is in no way challenged by petitioners. Further corroborating this fact is that although Sheffield Steel Corporation, with four open-hearth furnaces at Kansas City and remelting facilities at St. Louis, Missouri, and Sand Springs, Oklahoma, is at the very door of petitioners, and a large proportion of all scrap iron used by those mills is purchased from petitioners, petitioners never sold one car of these tank plates to that large remelter of scrap iron (R. 3284).

There Is No Different Application of the Scrap-Iron Tariffs by Eastern and Western Railroads.

Equally unfounded and without record support is the contention presented on pages 3 and 10 of the petition that there is any different treatment of this material, as a class, by the railroads east of the Mississippi River and those west of the Mississippi River, or that this material is in any way regarded differently in those territories. There is no confused situation as to the application of the tariff in the territories east and west of the Mississippi River. The refutation of this baseless contention is found in the petition itself. It clearly appears (pages 5 and 6) that the discussion between the inspection bureaus in the Western and Official Classification territories related to specific shipments of plates, and had nothing to do with this material as a class. The letter of the Official Classification Committee (R. 380), reproduced at page 5 of the petition, states:

> "* * * that if it is proven to the satisfaction of the terminal line that the shipments had value only for remelting purposes and are actually remelted, the scrap iron ratings would apply thereto."

Thus, the position of the Official Classification Committee and the lines in eastern territory is identical with that of the lines in western territory; that is, whether a given shipment is or is not scrap iron must be determined by an examination of the particular shipment. In western territory, Exhibit 2032 (R. 3345-6) indicates that the Western Weighing and Inspection Bureau was of the opinion, as to certain specific material inspected, that a part of such material could be used for other than remelting purposes, but that another part could not be used for any other purpose and was entitled to the scrap-iron rate. Likewise, as to another particular quantity of this material (R. 558-9), the Western Weighing and Inspection Bureau advised the Missouri-

Kansas-Texas Railroad that in its opinion, of sixteen cars inspected, five were found to contain scrap iron having value for remelting purposes only.

The Courts Below Have Followed the Well-Settled and Sound Construction of the Scrap-Iron Tariff.

Scrap-iron rates apply solely to material "having value for remelting purposes only." These words are simple, direct, English words, plain and unambiguous in their meaning, and the courts and the Interstate Commerce Commission have given to them the plain, clear meaning they convey. And contrary to the assertion of petitioners, and in simple logic, the use to which an object is put is broadly determinative of its value. In *Crancer* v. *Lowden*, 121 F. (2d) 645, scrap-iron rates were held inapplicable on second-hand used pipe thread protectors. At page 649 of its opinion the court said:

> "But evidence of the use for which the articles were purchased and the use to which they were actually put was properly considered in determining what they actually were."

This Court has heretofore granted certiorari in that case, but in so far as the particular holding of the court just quoted is concerned, such doctrine is in full and complete accord with the long and settled interpretation of this very tariff provision by the Interstate Commerce Commission. And this Court and other courts have always accorded great weight to the decisions of the Interstate Commerce Commission in matters involving interpretation of tariff provisions, and this should be especially so where the wording of the tariff provision in question was prescribed by the Commission itself. *Chicago Great Western R. Co.* v. *Postal Telegraph-Cable Co.*, 245 F. 592, *United States* v. *Pennsylvania R. Co.*, 21 F. (2d) 579.

Of extreme significance is the report of the Commission

in *Wrought Washer Mfg. Co.* v. *P. M. Ry. Co.*, 136 I. C. C. 703, which involved the reasonableness and applicability of the rates on certain iron and steel material shipped to Milwaukee from points in Illinois, Indiana, Ohio, Michigan, Kentucky, Pennsylvania, New York and West Virginia. Of particular interest in this proceeding is the fact that the Commission held that the scrap-iron rates were inapplicable to dismantled boiler and floor plates the corners of which were sheared off and then rerolled to appropriate thickness for washers. Part of the material was used for the manufacture of washers without employing any reheating process. At page 706 the Commission said:

> "Although some of the material was reheated and rerolled, it is generally conceded that this process, by which the material is softened but not reduced to a molten state, is not the equivalent of remelting. As the material manifestly has a recognized commercial value for purposes other than remelting, as indicated by the use which complainant makes of it, it does not come within the definition of scrap iron as carried in defendants' tariffs."

In *Wisconsin Waste and Wiper Co.* v. *C. & N. W. Ry. Co.*, 196 I. C. C. 459, the Commission stated at page 460:

> "The use to which a commodity is put is not determinative of the applicable rate, but the use may be considered in determining the nature of the commodity."

Pertinent also is *Schwartz* v. *St. L.-S. F. Ry. Co.*, 51 I. C. C. 145. There the complainant, engaged in the scrap iron business at St. Louis, Mo., claimed scrap-iron rates were applicable on old boiler flues and tubes. The evidence indicated these flues were damaged to such an extent as to render them unfit for further use in the manufacture or repair of boilers, but they were in such shape and condition that, after being cleaned, trimmed, and otherwise reconditioned, they could be utilized, without remelting, as pipe,

fence posts, or for other purposes. The Commission held that these usages constituted a recognized commercial value other than that of elementary metal and that scrap-iron rates were not applicable.

In *Weissbaum & Co.* v. *Director General*, 53 I. C. C. 681, complainant also claimed applicability of scrap-iron rates on old pipe and boiler flues and tubes. It had a large plant equipped with shears, hydraulic presses, acetylene torches, tumbling machines, etc., for the conditioning and remanufacturing into fence and sign posts and pipe for irrigation on farms, of discarded iron pipe and boiler flues and tubes which have outlived their usefulness for steam purposes. Complainant contended the material should be classified as scrap iron because its value was determined by the value of scrap iron for remelting purposes. The Commission, however, found that this material did have value for other than remelting purposes as indicated by its use, and that scrap-iron rates were not applicable.

In *Southern Scrap Material Co.* v. *New Orleans G. N. R. Co.*, 159 I. C. C. 266, the Commission held that scrap-iron rates could not be applied to second-hand railway-track rail in original form as taken from roadbed, because it could be used for its original purpose as holes were bored in ends so that each rail length could be joined together.

Also to the same effect as the foregoing cases are:

Union Smelting and Refining Co. v. *Pennsylvania R. Co.*, 152 I. C. C. 434.

Hyman-Michaels Co. v. *N. & W. Ry. Co.*, 126 I. C. C. 195.

Richmond Radiator Co. v. *C. & N. W. Ry. Co.*, 115 I. C. C. 743.

Alaska Junk Co. v. *S. P. & S. Ry. Co.*, 98 I. C. C. 551.

Chase Companies, Inc. v. *Director General*, 81 I. C. C. 207.

It is thus seen that the courts and the Commission have consistently and continuously given to the words "having value for remelting purposes only" their plain and clear meaning, and that where value for other purposes has been shown, as indicated by use, the scrap-iron rates have not been held applicable.

It is thus also demonstrated that completely inaccurate and misleading is the statement on page 24 of the petition that the Commission, recognizing that under a literal application of the definition there is no such thing as scrap, has repudiated a "strict sense" construction of the tariff definition. Such is simply and definitely not the fact. In the *Wrought Washer Mfg. Co. Case* cited, the Commission held specifically that the scrap iron rate was not applicable to the material in question, as its value for other than remelting purposes had been established by its use as aforesaid. While the Commission in that case gave some consideration as to whether the tariff definition of scrap iron might be improved, after a full consideration, it subsequently approved the same definition in a further hearing in the same case, *Wrought Washer Mfg. Co.* v. *P. M. Ry. Co.*, 159 I. C. C. 75, and subsequently prescribed the existing definition of scrap iron material having value for remelting purposes only for application in the very southwestern and western territory involved in this complaint in *Consolidated Southwestern Cases*, 123 I. C. C. 203, *Waste Material Dealers Assn. of Ark.* v. *C. R. I. & P. Ry. Co. et al.*, 152 I. C. C. 41, 164 I. C. C. 587, 226 I. C. C. 683.

The Mandamus Judgments Referred to by Petitioners Do Not Constitute Res Adjudicata as to Material Not Involved Therein, or Have the Effect of an Administrative Ruling for the Future as to Other Parties and Other Materials.

The judgments of the mandamus suits obviously operated only as to the specific material involved in those suits, and as to the parties thereto as to such specific material. To hold otherwise would vest the courts with legislative power, a power they do not possess. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 53 L. Ed. 150. In *Phillips* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, this Court held that when the Interstate Commerce Commission determined the reasonableness of a rate, such proceeding was not in the nature of private litigation between the shipper and the carriers, but was a matter of public concern in which the whole body of shippers was interested. No such *quasi*-legislative power is, however, vested in the courts. As stated by the Circuit Court of Appeals below, quoting from the opinion of the trial court (R. 3877-8):

> "Of course the judgment in the mandamus proceeding could not be broader and never was intended to be broader than the law upon which it was bottomed. The law was that the scrap iron or scrap steel rate should apply 'only on pieces (separate or combined) of iron or steel having value for remelting purposes only.' Obviously whether any given piece of iron or steel has value 'for remelting purposes only' depends upon its qualities and characteristics. And its qualities and characteristics must be ascertained by examination. That examination in the first instance is made by the shipper, who determines whether he believes the piece of iron or steel offered for shipment has value 'for remelting purposes only.' The second examination is made by the carrier, which determines whether the piece has value 'for remelting purposes only.' Perhaps the shipper and carrier do not agree. The con-

troversy may be submitted to the Interstate Commerce Commission. In that event the Commission will determine from examination whether the piece of iron or steel has 'value for remelting purposes only.' The controversy may be submitted to a court. In that event, the court will determine whether the piece has 'value for remelting purposes only.' The jurisdiction of the court will be limited to the discharge of that judicial function. Certainly the court will not legislate. Compare *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150. The court will not say to the parties before it: 'Hereafter when this shipper submits to this carrier a piece of iron and steel and claims it has value for remelting purposes only, the carrier will not test it by the legislative standard—Does it have value for remelting purposes only?—but by this new standard: Is the piece similar to some other piece?; or by this other new standard: Was the piece taken from a disused, obsolete, oil tank?' "

The judgments in the mandamus suits could, as a matter of law, operate only as to the specific material involved in those suits. As to that material, both of the courts below have recognized that the judgments therein are *res adjudicata*, but found as to such material that petitioners suffered no damage. Obviously, the findings of the courts, that the specific material involved in the mandamus suits was of such condition as to have value for remelting purposes only, had no bearing on the character, condition, or value of thousands of tons of tank plates not involved in those suits, not then owned by petitioners, and for the most part contained in standing tanks not then dismantled.

Summary of Reasons Why the Writ Should Be Denied.

1. The contention of petitioners that under a tariff applying scrap-iron rates to pieces of iron or steel having value for remelting purposes only, such rates should be applied to all plates from dismantled oil tanks even though the greater part of same be in good condition, can be used for all purposes for which new steel can be used, and sell on the market for prices far in excess of the prices for scrap iron, is clearly erroneous.

2. The contention of petitioners that a judgment of a court, finding that a particular quantity of plates from dismantled oil tanks consisting of twisted, bent, rusted, pitted, corroded plates have no value except for remelting, should be construed as adjudicating that all plates taken from dismantled oil tanks have no value except for remelting, irrespective of their condition, market value or use, is obviously untenable.

3. The findings of fact by the trial court and the Circuit Court of Appeals, that petitioners sustained no damages whatsoever either in connection with tank plates determined by previous judgments to be scrap iron or any other plates, for many reasons entirely unconnected with the determination of the question of the proper freight rate to be applied (R. 3883-86), would lead inevitably to the conclusion that the judgments of the lower courts in favor of respondents would not be disturbed, even though the petition should be granted and all questions presented therein determined in favor of petitioners by this Court. And for the same reason, the fact that this Court has granted certiorari in *Crancer* v. *Lowden*, 121 F. (2d) 645, No. 505, constitutes no ground for the granting of a writ of certiorari in the instant case.

It is respectfully submitted that the petition should be denied.

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APPENDIX.

Statement showing number of tons of plates from dismantled oil storage tanks, testified to by various witnesses, as having been used:

1. In re-erection of large oil storage tanks.

2. In construction of small welded tanks (commonly referred to as lease or field tanks or as "seconds").

3. Miscellaneous uses such as use in construction of culverts, gusset plates, bridge treads, bins, chutes, walkways, stairways, and various other articles, and in general repair work in and around various kinds of industrial plants.

(In making this statement every effort has been made to avoid duplication of tonnage where same tonnage is testified to by more than one witness. Where such tonnage is reflected in railroad movement exhibit, or in exhibits 2066, 2067 and 2068, covering records of Sonken-Galamba Corporations, reference to the pages of such exhibits is shown. Where the initials "SG" appear after the tonnage shown in the list, the witness testified that the particular tonnage so designated was purchased either from Sonken-Galamba Corporation, The Tank Corporation, or Sonken-Galamba Supply Company. However, where the witness does not identify particular tonnage purchased from such corporations, such designation is not used even though Exhibits 2066, 2067 and 2068 show such purchase.)

The total tonnage testified to by the various witnesses as shown in the following tabulation is 148,580.96, of which 26,328.59 tons are shown to have been purchased from either Sonken-Galamba Corporation, the Tank Corporation, or Sonken-Galamba Supply Company. Of the total tonnage disclosed by the witnesses' testimony as having

been used, they testified that 83,427.69 tons were used in the reerection of large oil storage tanks, 34,235.88 tons were used in the construction of small welded tanks, and that 30,917.47 tons went into other miscellaneous uses.

BAILEY, A. S., Texas Pine Line Co., 7185 tons reerected (R. 2400-04; Ex. 248, pp. 48, 49, 62, 64, 65, 74, 75).

BAKER, WALTER, Arp, Tex.. 40.50 tons SG miscl; 200 tons others miscl. (R. 3077-8; Ex. 248, p. 83; Ex. 2068, p. 3).

BAKER, S. W., Holly Sugar Corp., Golden Cycle Corp., and Pike's Peak Fuel Co., 57 tons miscl. (R. 2655).

BARNARD, GERALD B., Texas Tank and Salvage Co., 2200 tons reerected (R. 2332; Ex. 248, p. 79).

BARTHOLOMEW, D. R., Dyal & Sons, 356.11 tons SG miscl.; 33.07 tons others miscl. (R. 2687-9; Ex. 248, p. 84; Ex. 2608, p. 13).

BASOM, BYRON B., Kansas City Structural Steel Co., 1300 tons reerected (R. 2374-9; Ex. 248, p. 59).

BEARD, C. E., Dewey-Portland Cement Co., 95 tons miscl. (R. 2521-2).

BEECHER, S. B., Graver Tank & Mfg. Co., 2741 tons reerected (R. 2938,9; Ex. 248, pp. 75, 76).

BERNSTEIN, SAM, Bernstein Bros. Pipe and Machinery Co., 170.99 tons SG miscl; 179.01 tons others miscl. (R. 2877-8; Ex. 248, p. 85; Ex. 2068, p. 5).

BERRYMAN, O. H., General American Oil Co., 400 tons reerected (R. 3191).

BILLINGS, A. L., National Tank Co., 5754.90 tons SG welded tanks; 4964.03 tons others welded tanks (R. 2358-72; p. 6 Truck Shipments Ex. 2066; pp. 3 and 4 Truck Shipments Ex. 2067; Ex. 2068, pp. 33-37).

BOWEN, MAX, W., Golden Cycle Corp., 434.05 tons miscl. (R. 2652).

BRASHER, F. N., Wm. Hellis Canal Oil Co., 468 tons reerected (R. 3031-2).

Braud, Gaston, Thibodeaux Boiler Works, 823.59 tons SG miscl. (R. 2929-30; Ex. 248, pp. 81-85; p. 1 Rail Shipments Ex. 2067; Ex. 2068, p. 5).

Brown, Leland W., Darby Products & Steel Plate Corp., 1008.75 tons SG reerected; 1897.56 tons others reerected; 1063.77 tons SG miscl., 201.46 tons others miscl. (R. 2943-54; Ex. 248, pp. 53, 54, 82, 86, 87; p. 2 Rail Shipments Ex. 2067; p. 3 Truck Shipments Ex. 2067; Ex. 2068, p. 13).

Buff, B. F., National Zinc Co., 37.08 tons SG miscl. (R. 2522-3; p. 7 Truck Shipments Ex. 2066; p. 4 Truck Shipments Ex. 2067).

Cadina, E., C.I.A. Minera de Asarco, S.A., 600.65 tons miscl. (R. 2293).

Carlstrom, John, Texas Company, 4066.88 tons reerected (R. 2916-7, 2920-6; Ex. 248, p. 64).

Chrestmore, G. E., Jensen Bros. Mfg. Co., 20.65 tons SG miscl. (R.: 3049, p. 5 Truck Shipments Ex. 2066).

Clark, M. W., Tulsa Boiler and Machinery Co., 589.15 tons SG miscl. (R. 2482; p. 10 Truck Shipments Ex. 2066).

Clay, Geo. H., Sr., Clay & Bailey Mfg. Co., 63.80 tons SG miscl., 77.21 tons others miscl. (R. 2691-4; Ex. 248, p. 85; Ex. 2068, p. 8).

Colerich, Roy E., Northwestern Iron and Metal Co., 41.21 tons miscl. (R. 2727; Ex. 248, p. 61).

Coyle, R. M., Climax, Colo., 456.07 tons reerected (R. 2290-1; Ex. 248, p. 53).

Culver, J. M., Columbian Steel Tank Co., 603.64 tons SG miscl. (R. 3361-4; p. 2 Rail Shipments Ex. 2066; p. 4 Truck Shipments Ex. 2066).

Dampf, Clyde, Dysart & Dampf, 272.41 tons SG miscl.; 2327.59 tons others miscl. (R. 2774-5; Ex. 2068, pp. 13-14).

Davis, James M., American Smelting & Refining Co., 600 tons miscl. (R. 2787-94; Ex. 248, p. 67).

Dobkin, Rubin, Pipe & Steel Supply Co., 403.84 tons miscl. (R. 2748-50; Ex. 248, p. 56).

Ferguson, John, Jr., Veta Mines, Inc., 23.17 tons miscl. (R. 2292, Ex. 248, p. 61).

Foster, J. C., Sinclair Pipe Line Co., 7.69 tons miscl. (R. 2405; p. 8 Truck Shipments Ex. 2066).

Franklin, Mason E., American Potash & Chemical Co., 20 tons miscl. (R. 2747).

Gabriel, John S., Denver & Rio Grande Western Ry., 970.32 tons miscl. (R. 3002-16; Ex. 248, p. 46).

Gates, W. F., Black, Sivalls & Bryson, 2633.98 tons SG welded tanks; 2300 tons others welded tanks (R. 2891-3; Ex. 248, pp. 83-86; Ex. 2068, pp. 6-7).

Gentry, Geo. P., Phillips Petroleum Co., 4080 tons welded tanks (R. 2507-14; pp. 1-4 Truck Shipments Ex. 2066; p. 1 Rail Shipments Ex. 2067; p. 1 Truck Shipments Ex. 2067; Ex. 2068, pp. 10-12; under heading "Central Steel Co." in all exhibits).

Goodstein, Fred, American Iron & Metal Co., 585.40 tons miscl. (R. 2453-4; Ex. 248, p. 46).

Goodwin, J. H., Panhandle Steel Products Co., 1283.79 tons reerected (R. 2536-8; Ex. 248, p. 62).

Griffiths, Geo. B., Machinery Depot Ltd., 1271.49 tons SG reerected (R. 2416; Ex. 248, pp. 52-53; Ex. 2068, p. 8).

Grimes, Max, Morse Bros. Machinery, 450 tons miscl. (R. 2990).

Guye, Claud, Steel Tank Construction Co., 800 tons reerected (R. 3093-4).

Hancock, W. T., Hancock Oil Co., 565.30 tons SG reerected (R. 2328-30; Ex. 248, p. 82; Ex. 2068, p. 19).

Hand, Dewey, Hancock Oil Co., 300 tons reerected (R. 2244-5).

HARRIS, FLOYD H., Sinclair Pipe Lines Co., no definite amount stated but testifies to numerous uses (R. 2506-7).

HARRY, R. W., Steel Products Co., 926.36 tons SG miscl.; 170.02 tons others miscl. (R. 2701-12; p. 9 Truck Shipments Ex. 2066; p. 7 Truck Shipments Ex. 2067; Ex. 2068, p. 46).

HARVEY, J. B., Humble Pipe Line Co., 5784.30 tons reerected (R. 2585-90; Ex. 248, pp. 56-57).

HENDRICKSON, WARREN F., Ohio Oil Co., 498.40 tons reerected (R. 3023; Ex. 248, p. 62).

HOLLIER, F. J., Gulf Oil Co., 625 tons miscl. (R. 2915).

HUGHEN, JOSEPH M., Petroleum Iron Works Co. of Texas, 278.20 tons reerected (R. 3118-32).

JAMES, J. C., Western Road Supply Co., 1693.52 tons SG miscl.; 1693.52 tons others miscl. (R. 2471-7; p. 11 Truck Shipments Ex. 2066; p. 9 Truck Shipments Ex. 2067; p. 6 Rail Shipments Ex. 2067; Ex. 2068, p. 55).

JONCAS, J. A., Gas and Oil Products Co., 873.61 tons reerected (R. 2417-8; Ex. 248, pp. 54-85; Ex. 2068, pp. 1, 17).

JOYCE, R. J., Northwestern Barbed Wire Co., 173.50 tons SG miscl.; 97.35 tons others miscl. (R. 2982-6; Ex. 248, pp. 60, 79, 81, 88).

KEYES, A. C., Keyes Tank & Supply Co., 273.42 tons SG reerected; 1726.58 tons others reerected (R. 2441-8; Ex. 248, p. 60; Ex. 2068, pp. 24-25).

LEAVELL, M. F., Steel Tank Construction Co., 3488.85 tons SG reerected; 2700 tons others reerected (R. 2560-63; Ex. 248, pp. 71-3; p. 5 Rail Shipments Ex. 2067; Ex. 2068, p. 43).

LEE, W. N., Continental Oil Co., testified his company had purchased since 1936, 1633 lease tanks made from

plates from dismantled oil tanks, but tonnage covered in testimony of witnesses Billing and Gates.

LISTON, EARL C., Eaton Metal Products Co., 400.97 tons SG miscl. (R. 2412-3; Ex. 248, p. 86; Ex. 2068, p. 15; Ex. 2068 shows 557.72 tons purchased, but 156.75 tons purchased after date of deposition).

LOWE, E. J., Oil Country Specialties Mfg. Co., 244.59 tons SG miscl.; 43.46 tons others miscl. (R. 3051-2; pp. 7-8 Truck Shipments Ex. 2066; p. 6 Truck Shipments Ex. 2067).

MCKELVEY, J. F., Vulcan Steel Tank Co., 78.73 tons SG miscl.; 221.27 tons others miscl. (R. 3284-6; p. 11 Truck Shipments Ex. 2066; p. 8 Truck Shipments Ex. 2067; Ex. 2068, p. 52).

MCNAMAR, CHAS. A., McNamar Boiler & Tank Mfg. Co., 61.46 tons SG welded tanks; 13,138.54 tons others welded tanks (R. 2387-9; Ex. 2068, p. 30).

MORELAND, BANKS, Banks-Moreland Co., 12,049.74 tons reerected (R. 2568-80; Ex. 248, pp. 43, 44, 48, 49, 50, 54, 84, 85, 86; p. 1 Rail Shipments Ex. 2067; p. 1 Truck Shipments Ex. 2067; Ex. 2068, pp. 3-4).

OVERTON, H. B., Globe Oil & Refining Co., 43.80 tons reerected (R. 3080-1; Ex. 248, p. 87).

PALLFELT, H. A., Lisbon-Iberia Oil Corp., 94.36 tons reerected (R. 3034; Ex. 248, p. 81; Ex. 2068, p. 44 under heading "Rex Stegall").

PARIS, N. E., Austin, Tex., 136.30 tons reerected (R. 3053-4; Ex. 248, p. 60).

PARRISH, C. J., Denver, Colo., 500 tons miscl. (R. 2998-9).

PATTERSON, N. R., Patterson Steel Co., 175 tons SG miscl. (R. 2469-70; p. 8 Truck Shipments Ex. 2066; p. 6 Truck Shipments Ex. 2067; Ex. 2068, p. 40).

PAYNE, E. J., Pittsburgh-Des Moines Steel Co., 53.60 tons SG reerected; 2565 tons others reerected (R. 3139-66; Ex. 248, pp. 49 and 65; p. 8 Truck Shipments Ex. 2066).

PEPPER, JOSEPH E., Pipe and Mining Supply Co., 239.65 tons SG reerected; 1560.35 tons others reerected (R. 2405-7; Ex. 248, pp. 63, 65, 85, 86; Ex. 2068, p. 41).

PETERSON, H. A., Standard Oil Co. of Indiana, 850.31 tons reerected (R. 2935-6; Ex. 248, p. 70).

PILLSBURY, CHAS. S., Chicago Bridge & Iron Co., 5200 tons reerected (R. 696-9; Ex. 248, pp. 52-71).

POTTER, E. W., Cosden Petroleum Corp., 30.50 tons miscl. (R. 3023-4; Ex. 248, p. 89).

READ, A. H., Cheyenne, Wyo., 150 tons miscl. (R. 2730-1; Ex. 248, p. 60).

ROTHCHILD, B. A., Rothchild Boiler and Tank Works, 125.44 tons SG reerected; 2332.04 others reerected (R. 757-60; Ex. 248, pp. 66, 74, 76, 77, 84; p. 6 Truck Shipments Ex. 2067; Ex. 2068, p. 41).

SAGER, ROY L., Pioneer Asphalt Co. and Wishnick-Tumpeer, Inc., 22.07 tons miscl. (R. 3051, Ex. 248, p. 66).

SHRECK, E. E., Texas Co., 29 tons reerected (R. 3088-9).

SEIGEL, JOSEPH W., Amarillo Junk Co.-Wes-Tex Pipe Co., Inc., 1029.13 tons SG miscl.; 545.87 tons others miscl. (R. 2769-71; Ex. 248, pp. 82, 83, 88, 89; p. 1 Rail Shipments Ex. 2066; p. 1 Truck Shipments Ex. 2067; Ex. 2068, p. 2).

SILVER, H. G., Colorado Springs Iron & Metal Co., 81.75 tons SG miscl.; 618.25 tons others miscl. (R. 2643-5; Ex. 248, pp. 55, 85).

SILVER, W., El Paso, Tex., 4008.89 tons miscl. (R. 2798-9; Ex. 248, p. 67).

SINGER, LOUIS, Singer Steel Products Co., 75 tons miscl. (R. 2745-6).

Sleppy, Ralph, Barnsdall Pipe Line Co., 2800 tons reerected (R. 2381-2; Ex. 248, pp. 59, 71).

Smith, C. J., Texas Co., 1647.40 tons reerected (R. 2606-8).

Sparling, Joseph, Standard Tank Co., 886.90 tons SG reerected; 370.70 tons others reerected (R. 2348-50; Ex. 248, pp. 54, 56, 71; Ex. 2068, p. 44).

Stalcup, H. M., Skelly Oil Co., 534 tons welded tanks; 1576 tons miscl. (R. 3095-3104).

Steel, C. H., Orange Car & Steel Co., 378.50 tons miscl. (R. 2926-9; Ex. 248, p. 66).

Stegall, Rex, Kilgore, Tex., 136.38 tons SG reerected; 1757.99 tons others reerected (R. 3041-3; Ex. 248, pp. 74, 81; Ex. 2068, p. 44).

Summers, A. C., Ralph E. Fair, Inc., 1,000 tons reerected (R. 3271-2).

Sutherland, Lloyd, P&LE Ry., 879.41 tons miscl. (R. 2958-63; Ex. 248, p. 56).

Tabor, A., Steel Tank Construction Co. and Graver Tank & Mfg. Co., 400 tons reerected (R. 3090-3).

Tancred, John, Dallas, Tex., 1115 tons reerected (R. 2639-41; Ex. 248, p. 74).

Tilton, Roy R., Standard Oil Co. of Indiana, 1124.95 tons reerected (R. 2932-4; Ex. 248, pp. 67, 69).

True, L. H., Magnolia Pipe Line Co., 2467-97 tons reerected (R. 3279-80; Ex. 248, p. 73).

Warren, J. Q., Western Iron & Foundry Co., 342.35 tons miscl. (R. 2657-9; Ex. 248, p. 66).

Webster, Glenn B., Superior Welding Co., 12 tons miscl. (R. 2523-4).

Weil, Jay, Douglas Public Service Corp., 218.67 tons reerected (R. 3038-9; Ex. 248, p. 80).

WENDLAND, H. G., Wendland Mfg. Co., 65 tons miscl. (R. 3028-9; Ex. 248, p. 58).

WENTZ JOHN L., Wentz Equipment Co., 324.20 tons SG miscl.; 1187.06 tons others miscl. (R. 2679-84; Ex. 248, p. 84; p. 11 Truck Shipments Ex. 2066; p. 9 Truck Shipments Ex. 2067; Ex. 2068, p. 54).

WHITE, EDWARD, National Engineering Co., 424.28 tons SG miscl. 200.65 tons others miscl. (R. 2736-8; p. 6 Truck Shipments Ex. 2066; p. 4 Truck Shipments Ex. 2067; Ex. 2068, p. 33).

WHITE, K. V., Ash Grove Lime & Portland Cement Co., 20.25 tons miscl. (R. 2723-5; Ex. 248, p. 54).

WHITLOW, JESS, Goldenstern Pipe & Supply Co. and Goldenstern & Cohen, Inc., 1840 tons reerected (R. 2524-6 Ex. 248, p. 55).

WILLIAMS, C. L., Wyatt Metal & Boiler Works, 768.97 tons welded tanks (R. 2614-20; Ex. 248, p. 83; Ex. 2068, p. 53).

WILLIAMS, D. D., Chicago Bridge & Iron Works, 300 tons reerected (R. 2336-7).

WINDSOR, R. G., Universal Refineries, 150.99 tons reerected (R. 2886; Ex. 248, p. 79).

WOHL, J. D., Jaffey-Wohl Iron & Metal Co., 227.40 tons SG miscl. (R. 2627, p. 3 Rail Shipments Ex. 2066).

WOOD, B. G., Wood Machinery Works, 7.35 tons SG miscl.; 10.65 tons others miscl. (R. 3081-2; p. 11 Truck Shipments Ex. 2066).

WOOD, L. B., T&NO Ry., 263.26 tons miscl. (R. 2597-2600; Ex. 248, p. 58).

WOODWARD, JOHN F., Petroleum Iron Works, 263.95 tons reerected (R. 2905; Ex. 248, p. 63).

YAFFEY, W. M., Los Angeles, Calif., 46 tons miscl. (R. 2742, Ex. 248, p. 56).